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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) Criminal No. 08CR1728-IEG
11)
Plaintiff,) DATE: September 15, 2008
12) TIME: 2:00 pm
v.)
13 JESUS MANUEL PEREZ (1),) GOVERNMENT'S RESPONSE AND
14) OPPOSITION TO DEFENDANT'S
Defendant.) MOTIONS IN LIMINE TO:

- 15) (1) EXCLUDE 404(B) OR 609
16) EVIDENCE;
17) (2) EXCLUDE STATEMENTS BY
18) CO-DEFENDANT;
19) (3) EXCLUDE TESTIMONY REGARDING
20) DEMEANOR OR SILENCE;
21) (4) EXCLUDE EXPERT TESTIMONY,;
22) (5) EXCLUDE EXPERT TESTIMONY
23) ABOUT STREET VALUE OF COCAINE;
24) (6) EXCLUDE EXPERT TESTIMONY
25) ABOUT STRUCTURE OF DRUG
26) ORGANIZATIONS;
27) (7) EXCLUDE ACTUAL BRICKS OF
28) COCAINE FROM COURTROOM;
(8) PREVENT COPY OF INDICTMENT
FROM GOING INTO JURY
DELIBERATION ROOM;
(9) PRECLUDE EVIDENCE OF MUG
SHOT PHOTOS OR DEFENDANT'S
APPEARANCE AT THE TIME OF
ARREST;
(10) PRODUCE GRAND JURY TRANSCRIPT;
(11) PROVIDE SEPARATE COPY OF JURY
INSTRUCTIONS FOR EACH JUROR
DURING DELIBERATIONS; AND
(12) ALLOW ATTORNEY-CONDUCTED VOIR
DIRE

TOGETHER WITH STATEMENT OF FACTS
AND MEMORANDUM OF POINTS AND
AUTHORITIES

1 COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and
2 through its counsel, KAREN P. HEWITT, United States Attorney, and Anne
3 Kristina Perry, Assistant United States Attorney and hereby files its
4 response and opposition to defendant's above-referenced motions. This
5 response and opposition is based upon the files and records of the
6 case, together with the attached statement of facts and memorandum of
7 points and authorities.

8 I.

9 STATEMENT OF THE CASE

10 On May 28, 2008, a Federal Grand Jury seated in San Diego,
11 California, returned a two-count indictment charging the defendant
12 with importation of cocaine in violation of Title 21, United States
13 Code, Sections 952 and 960, and possession of cocaine with intent to
14 distribute in violation of Title 21, United States Code,
15 Section 841(a)(1). The defendant is presently in custody. On
16 August 29, 2008, defendant Jesus Manuel Perez filed the above
17 captioned motions. The United States files the following response.

18 II.

19 STATEMENT OF FACTS

20 On May 14, 2008, at approximately 10:20 a.m., defendants Jesus
21 Manuel Perez and Jose Gonzalez-Perales entered the United States at
22 the Calexico, California, West Port of Entry. Perez was driving a
23 brown 2000 Chrysler Sebring, and Gonzalez was a passenger in the
24 vehicle. The vehicle was registered in Perez's name, and bore
25 California license plate 6AMX949. At the primary inspection area, the
26 Defendants gave Customs and Border Protection Officer (CBPO) J.
27 Stensgard negative customs declarations. The vehicle was selected for
28 secondary inspection by an automated targeting system, and Perez

1 appeared nervous when CBPO Stensgard told him that the vehicle was
2 being referred to secondary.

3 At secondary inspection, Perez told CBPO L. Garcia that he owned
4 the vehicle, and that he and Gonzalez were traveling to Calexico to
5 go shopping. CBPO Garcia requested that the two defendants exit the
6 vehicle and asked CBPO S. Barela to conduct an inspection of the
7 Sebring using his Narcotics Detector Dog, "Astrix." During the
8 inspection, CBPO Garcia noted that both defendants acted nervous and
9 that their hands were shaking. Astrix entered the vehicle and alerted
10 to the backseat rest portion of the vehicle's interior. The
11 defendants were immediately handcuffed. Further inspection of the
12 vehicle by CBPO Garcia revealed 20 packages concealed in a non-factory
13 compartment behind the backseat. The packages were wrapped in clear
14 cellophane with tan-colored packing tape. A probe of the packages
15 produced a white powdery substance, which field-tested positive for
16 cocaine. The 20 packages had a combined net weight of approximately
17 22.60 kilograms (49.72 pounds).

18 Perez and Gonzalez were each placed under arrest and each were
19 separately advised of their Miranda Rights. During each interview,
20 both Perez and Gonzalez acknowledged their rights, waived their
21 rights, and agreed to answer questions. During the Perez interview,
22 Perez stated to Immigration and Customs Enforcement Agent Dotson that
23 he thought that the vehicle contained 20 kilograms of marijuana.
24 Perez stated that he was to be paid \$1,500.00 to take the vehicle to
25 the "hotel near the carwash" in Calexico, California. Perez and
26 Gonzalez are friends, and they spend time together. Perez stated that
27 Gonzalez called him the day before to arrange a ride to Gonzalez's
28

1 Probation Officer's house in El Centro, CA. Perez picked Gonzalez up
2 from Gonzalez's girlfriend's house on the morning of May 14, 2008.

3 During the Gonzalez interview, Gonzalez denied knowledge of any
4 illegal substance in the vehicle. He stated that he had never seen
5 the vehicle before May 14, 2008. Gonzalez stated that he and Perez
6 are roommates and that they don't see each other very much. He
7 claimed that they happened to meet each other as Gonzalez was going
8 to the bus station in order to see his Probation Officer, and that
9 Perez offered Gonzalez a ride instead.

10 III.

11 POINTS AND AUTHORITIES

12 A. DEFENDANT'S PRIOR CONVICTION IS ADMISSIBLE
13 PURSUANT TO FED. R. EVID. 404 AND 609

14 This defendant is still on supervised release for a prior
15 marijuana smuggling event. As set forth in the United States' Motions
16 in Limine, the prior event is admissible for impeachment, but more
17 importantly as "other acts" evidence pursuant to Fed. R. Evid. 609.
18 It must be noted that full discovery regarding the earlier case has
19 been provided for the defendant's review. The United States would
20 also draw this court's attention to a recent relevant, albeit
21 unpublished decision by the Ninth Circuit in this regard, United
22 States v. Pilgrim, 270 Fed. Appx. 662 (9th Cir. 2008), wherein the
23 Court upheld the decision of one of the district judges in this
24 District to admit evidence of prior marijuana smuggling in an
25 importation of cocaine case. For these reasons, and for the reasons
26 set forth in the Government's Motions in Limine, evidence regarding
27 the defendant's prior drug importation should be admitted in the
28 Government's case-in-chief.

1 **B. THE MOTION TO EXCLUDE STATEMENTS BY THE**
2 **CO-DEFENDANT SHOULD BE DENIED**

3 The various pleadings in this case have described the nature of
4 co-defendant Gonzalez-Perales' statements to interviewing officers.
5 He denied having any knowledge of the cocaine in the vehicle, and
6 provided no information as to whether this defendant had such
7 knowledge. As such, the co-defendant's statement does not rise to
8 the level of a severance-warranting statement as seen in Bruton v.
9 United States, 391 U.S. 123 (1968). In Bruton, as in many cases where
10 severance of cases are sought, the co-defendant's statement about
11 Bruton was inculpatory. Gonzalez-Perales' statement was not. In an
12 abundance of caution, the United States is willing to provide
13 testifying witnesses with any instructions of the Court's choosing
14 with regard to any evidence about either defendant's statements.

15 **C. THE MOTION TO EXCLUDE DEMEANOR EVIDENCE SHOULD BE DENIED**

16 It is highly likely that a CBP officer may testify that he
17 observed some nervousness on the part of this defendant. Contrary to
18 the defendant's assertions in his pleadings, this evidence is
19 admissible. United States v. Velarde-Gomez, 269 F.3d 1023, 1030 (9th
20 Cir. 2001). There are likely to be no comments on his silence, as
21 this defendant was not silent.

22 **D. THE MOTION TO EXCLUDE EXPERT TESTIMONY MUST BE DENIED**

23 As these motions and responses are being written, it is still a
24 month before trial. The defendant has moved to exclude any expert
25 testimony because the government previously advised that discovery was
26 "complete" in this matter. More accurately, the United States
27 continues to recognize its discovery obligations. There will be two
28 experts testifying in this case, possibly three depending on how the
testimony proceeds. Certainly, there will be an analyst from the DEA

1 lab to testify that the substance seized from the vehicle Perez drove
2 was cocaine. Each defendant received the drug analysis in open court
3 at the last session. The CV and analysis of the chemist will be
4 provided forthwith.

5 The United States intends to call an experienced agent to testify
6 regarding drug values and the structure of drug organizations in
7 accordance with Ninth Circuit precedent. Curriculum vitae for these
8 agents will be provided two weeks before trial. For the reasons set
9 forth in its motions in limine, the United States requests that the
10 defendant's motions to preclude expert testimony be denied.

11 **E. THE COURT SHOULD ADMIT TESTIMONY REGARDING**
12 **THE STREET VALUE OF THE COCAINE**

13 Evidence of the street value of drugs is admissible to
14 demonstrate a defendant's knowledge and intent. United States v.
15 Campos, 217 F.3d 707 (9th Cir. 2000). For this reason, and for the
16 reasons set forth in its Motions in Limine, the United States requests
17 that the motion to preclude such testimony be denied.

18 **F. THE COURT SHOULD ADMIT TESTIMONY ABOUT**
19 **THE STRUCTURE OF DRUG ORGANIZATIONS**

20 The United States repeats and realleges its arguments from its
21 Motions in Limine in urging the Court to allow such testimony.

22 **G. THE COURT SHOULD ALLOW THE ACTUAL BRICKS**
23 **OF COCAINE TO BE DISPLAYED TO THE JURY**

24 It has been argued that the presentation of the bricks of cocaine
25 in this case will "inflame the passions of the jury." That is an
26 overstatement at best, and the bricks are actual evidence in this
27 case.

28 The Government intends to bring the bulk cocaine into the
courtroom. The jury is entitled to observe and see for themselves the
packages the Government contends contain cocaine. The cocaine is the

1 very essence of the crimes charged in the indictment. The presence
2 of the cocaine is not overly prejudicial under Rule 403 as the jury
3 will hear about the weight charged in the indictment, through witness
4 testimony, and in the jury instructions. Furthermore, the weight and
5 its value are circumstantial evidence of Defendant's knowledge.

6 **H. THE MOTION TO PREVENT A COPY OF THE INDICTMENT**
7 **FROM GOING INTO THE JURY DELIBERATION ROOM IS SUBMITTED**

8 While it has long been held that it is not improper for jurors
9 to have a copy of the indictment during their deliberations, see
10 United States v. Steed, 465 F.2d 1320 (9th Cir. 1972), the United
11 States will defer to the normal practice of this Honorable Court.

12 **I. THE MOTION TO PRECLUDE EVIDENCE OF MUG SHOT**
13 **PHOTOS OR DEFENDANT'S APPEARANCE AT THE**
14 **TIME OF ARREST SHOULD BE DENIED**

15 It is possible that photos of each defendant may have some
16 relevance depending on the course of the testimony. The United States
17 will make certain that any photographs of either defendant in this
18 case taken in this case do not have a number or anything on them that
19 distinguishes the defendants as being in custody. The United States
20 intends to provide each defendant with a marked copy of exhibits prior
21 to trial. Objections to actual evidence can be raised before the
22 trial begins.

23 **J. THE MOTION TO PRODUCE GRAND JURY TRANSCRIPTS MUST BE DENIED**

24 No percipient witnesses in this case testified before the grand
25 jury, ergo this motion may be denied as moot.

26 **K. THE MOTION TO PROVIDE A SEPARATE COPY OF JURY INSTRUCTIONS**
27 **FOR EACH JUROR DURING DELIBERATIONS IS SUBMITTED**

28 The United States will defer to the normal practice of this
Honorable Court in determining this motion.

1 **L. THE MOTION TO ALLOW ATTORNEY-CONDUCTED**
2 **VOIR DIRE SHOULD BE DENIED**

3 While it is in the discretion of the Court to allow attorney-
4 conducted voir dire, United States v. Cutler, 806 F. 933(9th Cir.
5 1986), there is nothing particularly complex about this case that
6 would require questioning other than that performed by the Court.
7 That being said, should the Court offer the parties the opportunity
8 to conduct voir dire, the United States would request equal time with
9 the defense.

10 **M. THE UNITED STATES INCORPORATES BY REFERENCE**
11 **ANY RELEVANT ARGUMENTS MADE IN RESPONSE TO THE**
12 **CO-DEFENDANT'S MOTIONS IN LIMINE**

13 As some similar arguments have been made by the co-defendant
14 herein, the United States respectfully asks this Court to consider any
15 relevant responses to those arguments in its determinations as to this
16 case.

17 **IV.**

18 **CONCLUSION**

19 For the above stated reasons, the Government respectfully
20 requests that the Defendant's motions be denied, except where
21 unopposed.

22 DATED: September 5, 2008.

23 Respectfully submitted,

24 KAREN P. HEWITT
25 United States Attorney

26 s/Anne Perry
27 Anne Kristina Perry
28 Assistant U.S. Attorney
 anne.perry2@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 08CR1728IEG

Plaintiff,)

v.)

JESUS MANUEL PEREZ (1),)

Defendant.)

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, ANNE PERRY, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motions in Limine on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Elizabeth Barros, Esq.

Email: elizabeth_barros@fd.org

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 5, 2008.

s/Anne Perry

ANNE KRISTINA PERRY